No. 15,216

IN THE

United States Court of Appeals

For the Ninth Circuit

HUNT FOODS, INC., a Corporation,
Appellant,

vs.

WELLINGTON PHILLIPS and
H. W. LIHOLM,
Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S PETITION FOR A REHEARING.

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To the United States Court of Appeal for the Ninth Circuit, Honorable A. L. Stephens, Chief Judge, William Healy and W. L. Pope, Judges thereof:

Appellant respectfully petitons for a rehearing in the matter of this appeal. Judgment of this Court affirming judgment in favor of appellees, was filed on August 7, 1957.

1. THE EQUAL DIGNITIES RULE.

The opinion, on this point, would reverse this Court's own prior decision, and would completely change the law of California with respect to the

application of Civil Code, Section 2309, generally known as "The Equal Dignities Rule".

This section provides in part:

> ". . . an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing."

There are two exceptions: (1) where the agent signs at the direction of and in the presence of the principal and (2) where the agent is an *executive* officer of a corporation (2 *Cal. Jur.* (2d) 728).

To warrant an estoppel against reliance on this section, there must be proof that the corporation, *knowing of the alleged contract,* affirmatively did something that would estop it from denying the authority of its employee to enter into that contract. There is no proof that appellant (other than its employee Flynn) ever knew of a contract with appellees such as that found by the Court. The evidence, in fact, shows that no executive officer ever knew that Phillips was operating under the contract found here (Tr. pp. 141 and 424, 445 and 446). Appellee Phillips admits that the contract was "unique" for appellant (Tr. p. 446) and in appellee's brief, at page 7, it is admitted that Hunt never had a similar contract.

The Court here announces an astonishing rule. It finds that appellees would suffer unconscionable injury as a result of reliance on the *agents'* promise, and and therefore (the Court says) appellant corporation is estopped from raising a defense that appellees did not and could not prove that any executive officer of

appellant knew of the admittedly "unique" contract. If this be the law, a corporation can never deny the authority of an employee so long as an employee made promises to another on which the other relied and suffered detriment i.e. the fact that a plaintiff has suffered injury is enough without more, to raise an estoppel, even though the employee acted beyond his authority and without knowledge of the employer. How, then, is an employer to protect itself against a secret contract negotiated by an employee beyond his authority?

This decision would emasculate California Code, Section 2309 by creating an automatic estoppel against reliance on the section, if the plaintiff suffers injury sufficient to raise an estoppel against the Statute of Frauds. This would make unimportant the fact that appellees' injury resulted from reliance on an unauthorized promise of an employee, a promise beyond the employee's authority and unknown to the employer.

This Court merges the Code section with the Statute of Frauds; but the two laws are separate and distinct enactments, albeit related. The Statute of Frauds is concerned with proof of a contract which is known to both parties. Civil Code, Section 2309 deals with the authority of an agent to bind his employer; it protects an employer against unauthorized contracts in the absence of some misleading action by the employer. It does not follow therefore that the same facts creating an estoppel as to the one will create an estoppel as to the other. *It will be noted that there*

is absolutely no mention in the opinion of any facts to warrant estoppel to raise the Equal Dignities Rule.

The opinion fails to discuss the crucial question: What was done by the appellant corporation, through its executive officers, to estop it from raising the issue of authority?

The Court states that *Monarco v. Lo Greco* (1950), 35 Cal. (2d) 621, 220 Pac. (2d) 737 "appears" to have liberalized the requirements for a finding of estoppel to assert the Statute of Frauds and thereby concommitantly liberalized the requirements with respect to the Equal Dignities Rule.

The Court does not point to what, under a "liberalized" rule or otherwise, justifies the estoppel here as to the Equal Dignities Rule. It will be noted that since the *Monarco* case (which did not involve agency) the California authorities have not mentioned any "liberalized" rules as to Section 2309. In 1956, *six years after* the *Monarco* decision, the California Court still required proof of an affirmative act by the principal by which the third party is led to believe in the authority of the agent (Cf: *Cigretti v. Amer. Trust Co.,* (California 1956), 294 P. (2d) 490. In Volume 2, *Cal. Jur.* (2d) p. 730, which was published *two years after* the *Monarco* case, it is said:

> ". . . but the estoppel will arise only where the other party to the contract is prejudiced by *reliance on some affirmative act of the principal.*"

Further support for the fact that the *Monarco* case did not change or liberalize the law in respect to Civil Code 2309 is found in *Credit Bureau of San Diego v.*

Beach (September 1956), 144 Cal. App. (2d) 439 at 444, 301 Pac. (2d) 87. This case, *decided six years subsequent* to the *Monarco* case, involved a question of ostensible agency but the rules respecting that question are similar to those on estoppel. The Court said:

> "It is a general rule of law that where a third person relies upon an ostensible agency, he must give evidence of similar transactions in which the act of the agent was authorized or recognized."

Not only does the Court in the instant case create new law for California but it reverses its decision in *E. K. Wood Lumber Company v. Moore Well and Lumber Co.,* 97 Fed. (2d) 402 at 409, where, in a similar case, the Court said:

> ". . . There is no testimony in the record before us from which it may be inferred that Carl R. Moore was an officer of appellee corporation,"

and

> ". . . In this case there is no evidence from which it could be inferred that appellee represented either that its agent had written authority or that it would not avail itself of the defense of the Statute."

and, further,

> "Appellee could in no way be estopped to assert the defense of California Civil Code, Sec. 2309, *unless it represented that its agent was authorized to enter into contracts required to be in writing."* (Emphasis added).

See also:

Anderson v. Standard Lumber Co., 64 Cal. App. 410, 1 Pac. 495.

The California Supreme Court in *Seymour v. Oelrichs,* 156 Cal. 782 at 788, 106 Pac. 88 p. 92 held that knowledge by a principal of *some* contract with the other party does not justify any inference of ratification of or notice of a contract required to be in writing.

There is no issue of ostensible authority because, to rely on such authority, appellees must produce evidence of similar transactions in which the act of the agent was authorized or recognized. Appellees must show at least one specific instance in which a similar act of the agent was authorized, (2 *Cal. Jur.* (2d) p. 700). Here as noted above, the particular contract was "unique" for Hunt Foods who have never previously entered into such a contract.

We respectfully submit that the *Monarco* case did not liberalize rules but summarized the long standing California rules. Actually the Court in that case analyzed prior decisions and held that it is not necessary, in order to raise an estoppel against the Statute of Frauds, to show that, in addition to unconscionable injury or unjust enrichment, the defendant had also represented that no writing was necessary or represented that the Statute would not be relied upon as a defense. In that case there was no question of the stepfather's knowledge of his unjust enrichment ($96,000) at the expense of the stepson's 30 years of work without pay on the stepfather's ranch. The stepfather deliberately defrauded the boy. It was a clear case for estoppel. In the *Monarco* case, and in the cases therein cited, both parties knew the contract

existed and therefore the *Monarco* case is not any authority that estoppel may arise, even when there is no proof that the defendant knew of the contract.

The *Monarco* case had nothing to do with agency questions and therefore it cannot be said, as the Court does here, that it "appears to modify" the holding of this Court in *Georgia Peanut Co. v. Famo Products Co.* (9th Circuit), 96 F. (2d) 440.

We respectfully submit that the cases cited in the opinion are not in point. *Berkey v. Halm,* 224 Pac. (2d) 885 did not involve agency. The plaintiff there, in reliance on the promise of the defendant, ceased all other work and gave all his business accounts to the defendant, who deliberately defrauded him.

In *Le Blond v. Wolfe* (1948), 188 Pac. (2d) 278, the agent signed the disputed contract at the specific direction of and in the presence of the principal. This is one of the two exceptions to the rule requiring proof of authority (2 *Cal. Jur.* (2d) 728) because it is, in law, the act of the principal (see *Lathrop v. Gough* (1954), 127 Cal. App. (2d) 754 at 764, 274 Pac. (2d) 730).

In *Jeppi v. Brockman Holding Co.* (1949), 34 Cal. (2d) 11, the president of the corporation (an executive officer, of course) with the authorization of the board of directors signed the disputed agreement. Thus, there are two clear distinctions: *First,* there was actual authority given the president by the board of directors all of whom had knowledge of the corporaton and *second,* the contract was made by an executive officer, in which case Civil Code 2309 does not

apply under one of the above-mentioned established exceptions.

It is difficult to understand how any of these cases may be pertinent here. They don't involve questions of authority and clearly concern contracts of the principal rather than a question of the power of an employee to bind an innocent and uninformed employer to a forbidden contract.

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2. TERMINATION AND MUTUALITY.

On the mutuality issue, this Court says that appellees could be required to buy appellant's goods because appellees were obliged to use their best efforts in the sale of goods but the California Court has specifically held that a promise to push the sale of products is not an enforceable consideration. See *Scott v. Cline Electric Manufacturing Co.,* 104 Cal. App. 123 at 126, 285 Pac. 349 at 351.

J. A. Folger & Co. v. Williams (1954), 129 Cal. App. (2d) 24, 276 Pac. (2d) 645 holds that an agreement to tender "as many of its shipments as in general business and market conditions will warrant" furnishes no consideration and lacks mutuality.

Comment on: *Ford Motor Company v. Kirkmyer Motor Company,* 65 Fed. (2d) 1001: We respectfully submit that this case is *not* cited out of context. It is true the Court there analyzed an earlier written contract which permitted termination at will and the Court discussed other features, but the Court ex-

pressly states that its decision is *not* based on those matters but on the ground that the oral contract, in so far as it relates to the sale of defendant's products to plaintiff, is lacking in mutuality. It was the oral contract (which was not expressly terminable at will) that lacked mutuality.

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3. STATUTE OF FRAUDS.

On this subject, the Court finds that "if the contract is not enforced, an unconscionable injury will result." But the record is clear that at the time of termination appellees had no resources which would enable them to continue to perform. If the contract were not terminated appellees would, nevertheless, have been unable to perform. They had no capital (Transcript, p. 144) and no credit resources (Transcript, pp. 390 to 393) at the time of termination. It is stipulated in appellee's brief (p. 10, lines 8-11) that appellant did not cause the inadequacy of appellee's credit resources, so their plight was not due to appellant. Estoppel, of course, implies some causation.

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4. DAMAGES.

Prospective damages like any other type of damages must be proved by the best available proof and the burden is on plaintiffs (*Allen v. Gardiner* (1954), 272 Pac. (2d) 99); (*Austin v. Roberts,* 20 Pac. (2d) 97 at 99). Appellees did not prove the gross sales for the period of operation to *any* of the 16 commissaries.

They introduced evidence of particular months, carefully selected because in other months the sales were "spotty" and then guessed from that as to the business they actually did during the 16 months. The opinion of appellee Phillips as to what sales he actually made or could have made, has no probative force. *Lewis-Hale Co. v. Enterprise Fuel Company* (4th Cir.), 33 Fed. (2d) 727 at 730.

As to whether gross profits alone were used as a basis for judgment, this Court states that the appellees' income tax return for the year 1952 shows some $6,000.00 in expenses. The Court overlooks the fact that during that year, the appellees did over a quarter of a million dollars in their bidding business for others and they had increased their brokerage business by some forty per cent. There is no evidence in the tax return or otherwise as to what expenses were attributable to the Hunt business. The income tax return does not apportion expense as to this business. This Court would *assume* the amount of appellees' expense after stating the rule that net profits must be shown.

Dated, San Francisco, California,
August 29, 1957.

CUSHING, CULLINAN, DUNIWAY & GORRILL,
By VINCENT CULLINAN,
Attorneys for Appellant and Petitioner.

Certificate of Merit

I, Vincent Cullinan, one of the attorneys for appellant, certify that I have personally handled the trial and appeal in this matter and that in my judgment the foregoing petition for a rehearing is well founded. I further certify that said petition is not interposed for delay.

Dated, San Francisco, California,
August 29, 1957.

Vincent Cullinan.